Supreme Court, U.S.
FILED
MAY 9 1991
OFFICE OF THE CLERK

CASE NO. 90-1645

In The

Supreme Court of the United States

October Term, 1990

ARTHUR TATE, JR., WARDEN,

Petitioner,

v.

JAMES L. BELL,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF THE CASE

The State of Ohio obfuscates by what it does not say. On October 30, 1980, the Court of Appeals of Scioto County (Fourth Appellate District) affirmed the convictions of James L. Bell. In so doing, at page eight of their opinion, the Court of Appeals stated:

> The pertinent instruction respecting complicity given to the jury, to which no objection was

> entered, was the following. . . . *State of Ohio v. James L. Bell*, P. 8.

The Fourth District recites the challenged instruction and then spends two pages addressing the sufficiency of the evidence, the merits of Bell's contention, and at page eleven (11) holds:

> the judgment is not against the manifest weight of the evidence. Accordingly the first assignment of error is overruled.

Since no procedural default was used to bar Bell's claim the Fourth District concluded: "We hold, therefore, that sufficient evidence existed to present a Jury question . . . " *State of Ohio vs. James L. Bell*, P. 10-11.

The Respondent, James L. Bell, thereafter filed a timely Memorandum in Support of Jurisdiction in the Ohio Supreme Court. His *pro se* memorandum recited two Propositions of Law which were clearly of constitutional dimension. In Proposition of Law Number One Bell asserted:

> Where the Trial Record is totally Devoid of all evidentiary Support to support a finding of guilty on each of the elements beyond [sic] a reasonable doubt . . . then the accused has been denied due process of law in violation of the Fourteenth Amendment to the United States Constitution.

In Proposition of Law Number Five Bell asserted:

> Where counsel failed to properly raise issues on appeal which could have been raised and should have been raised then the accused has been denied the effective assistance of counsel on direct appeal in violation of the Sixth and

Fourteenth Amendments to the United States Constitution.

Given the fact that the Magistrate, the District Court, and the Court of Appeals all must have found that Bell had fairly presented his due process challenge to the jury instructions (however inartfully) it appears that the State's silence on this sequence is more than merely inadvertent.

ARGUMENT IN SUPPORT OF DENYING CERTIORARI

A.

CERTIORARI SHOULD BE DENIED BECAUSE OHIO LAW GRANTS RESPONDENT NO POST-CONVICTION REMEDY

Generally, in Ohio, a prisoner may not raise ineffective assistance of counsel claims in post-conviction proceedings where he could have raised such issues on direct appeal. Res judicata bars the post-conviction consideration of such issues. *State v. Cole*, 443 N.E. 2d 169 (1982) (Citing, in the Court's syllabus, *State v. Hester*, 341 N.E. 2d 304 (1976)). Most recently the Ohio Supreme Court has held that ineffective relief claims cannot be brought in collateral proceedings (ORC 2953.21) because they may be appealed directly to the Ohio Supreme Court under Section 2 (B) (2) (a) (iii) of Article IV of the Ohio Constitution. *In re Petition of Brown*, 49 Ohio St. 3d 223, 551 N.E. 2d 954 (Oh. 1990); *Accord: Manning v. Alexander*, 50 Ohio St. 3d 127, 553 N.E. 2d 264 (Oh. 1990). Respondent's only remedy was, and is, federal habeas. Cf. *Pillette v. Foltz*, 824 F. 2d 494 (6th Cir. 1987).

B.

CERTIORARI SHOULD BE DENIED BECAUSE THE OHIO COURT OF APPEALS AND OHIO SUPREME COURT NEVER PROCEDURALLY BARRED BELL FROM CHALLENGING THE JURY INSTRUCTION WHICH CAUSED HABEAS RELIEF TO BE GRANTED.

An inadequate state forum can constitute cause for a procedural default, e.g. *Alcorn v. Smith*, 781 F. 2d 58, 63 (6th Cir. 1986). And a procedural default does not necessarily bar the remedy of habeas corpus, "unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Hill v. McMackin*, 893 F. 2d 810, 813 (6th Cir. 1989); See also *Tuggle v. Seabold*, 806 F. 2d 87, 92 (6th Cir. 1986); *Accord: Alexander v. Foltz*, 838 F. 2d 140 (6th Cir. 1988) and *Rice v. Marshall*, 816 F. 2d 1126 (6th Cir. 1987). See also *Cohen v. Tate*, 779 F. 2d 1181 (6th Cir. 1985).

In the present case these fundamental general rules were simply followed by the Magistrate, District Court and Court of Appeals. As such, no purpose would be served by granting the writ of certiorari.

C.

CERTIORARI SHOULD BE DENIED BECAUSE THE MAGISTRATE, THE DISTRICT COURT AND THE COURT OF APPEALS ALL CORRECTLY APPLIED THE "CAUSE" AND "PREJUDICE" STANDARD FOR PROCEDURAL DEFAULTS.

It is axiomatic that the "cause" and "prejudice" standard applies to procedural defaults. *Leroy v. Marshall*, 757 F. 2d 94 (6th Cir. 1985), cert. denied, 474 U.S. 831 (1985). See also *Gilbert v. Parke*, 763 F. 2d 821 (6th Cir. 1985);

Ewing v. McMackin, 799 F. 2d 1143 (6th Cir. 1986). *Accord*: *Ferguson v. Knight*, 809 F. 2d 1239 (6th Cir. 1987).

The state, in their petition, argues that:

> The Sixth Circuit in the present case has ruled contrary to . . . at least six other circuits on the question of exhaustion . . . *Petition for Writ of Certiorari*, P. 9.

In footnote 2 at page 9 the State cites *Sampson v. Love*, 782 F. 2d 53 (6th Cir.), Cert. denied, 479 U.S. 844 (1986). *Sampson* convasses the decisions of *Domaingue v. Butterworth*, 641 F. 2d 8 (1st Cir. 1981); *United States ex rel Boodie v. Herold*, 349 F. 2d 372 (2nd Cir. 1965); *Brown v. Estelle*, 701 F. 2d 494 (5th Cir. 1983); *Schiers v. People of State of California*, 333 F. 2d 173 (9th Cir. 1964) and *Jones v. Hess*, 681 F. 2d 688 (10th Cir. 1982) in analyzing the parameters of cases wherein facts outside the record "necessitated further collateral proceedings in State Courts." *Sampson v. Love*, 782 F. 2d 53, 55 (6th Cir. 1986). Yet the State of Ohio presently asserts that the Sixth Circuit ruled contrary to these circuits. This is rather peculiar, and seemingly false.

The only other case that Ohio places substantial reliance upon is *Laws v. Armontrout*, 834 F. 2d 1401 (8th Cir. 1987). In that case the defendant brought a habeas corpus action, after being found in criminal and civil contempt of court, for violating the local zoning ordinances regulating "adult bookstores." The simple presence of First Amendment considerations indicates that such a precedent has no place in the context of the present petition for certiorari.

In sum, the State of Ohio has presented no conflict with controlling case law that would necessitate a grant of the writ of certiorari in the present situation.

D.

CERTIORARI SHOULD BE DENIED BECAUSE THE OHIO COURTS ADDRESSED THE CONTENTIONS OF MR. BELL REGARDING DUE PROCESS AND THE JURY INSTRUCTIONS AND THEREFORE WAIVED ANY ALLEGED PROCEDURAL DEFAULT

U.S. Sup. Ct. Rule 15.1 admonishes counsel to point out any mistatement of fact or law set forth in the Petition. Counsel asserts that the State gives "short shrift" to the actual findings of the Courts in the present cause. For instance, the Magistrate correctly noted that Bell challenged the jury instructions and raised ineffective assistance at pg. 33-37 of his habeas corpus petition. See Petitioner's Appendix, P.A-44 (Part V).

The Magistrate then found that the challenged instructions contained two errors:

> The more egregious error occurred when the court instructed the jury that the existence of Bell's purpose to kill was established if the jury found that Gambill alone possessed a purpose to kill Kennard and Coleman. Appendix, Petition for Cert., P. A-48

Finally, the Magistrate properly concluded:

> A thorough review of the entire jury instruction fails to reveal any portion of the instruction which clarified that an independent purpose to

> kill on Bell's part was required or that the existence of Gambill's purpose to kill did not necessarily establish Bell's purpose to kill. Appendix, Petition for Cert., P. A-51.

The Ohio Court of Appeals thoroughly reviewed the challenged instructions but misapplied Ohio law. Appendix, Petition for Cert., P. A-50. Yet the Ohio Court of Appeals never procedurally defaulted Mr. Bell for the lack of a contemporaneous objection under the Ohio Rules of Criminal Procedure. The Ohio Supreme Court thereafter simply dismissed Mr. Bell's appeal for want of a substantial federal question. This is on the merits under *Cohen v. Tate*, 779 F. 2d 1181 (6th Cir. 1985).

Despite all this, the State ignores the general rule that procedural defaults will not bar due process objections if:

> the State court's eschewed grounding their denial of relief on an alleged procedural default. *Jones v. Jago*, 701 F. 2d 45, 47 in N.2 (6th Cir. 1983).

This counsel asserts that all Circuits are replete with cases which espouse this general rule, for there can be no other rule in a system where the states are the final arbiters of the interpretation of their own rules. The Sixth Circuit simply follows this basic principle. See e.g. *Hill v. McMackin*, 893 F. 2d 810, 813 (6th Cir. 1989); *Alexander v. Foltz*, 838 F. 2d 140, 146 (6th Cir. 1988); *Accord: Elmore v. Foltz*, 768 F. 2d 773, 776 (6th Cir. 1985); *Rudolph v. Parke*, 865 F. 2d 738, 739 (6th Cir. 1988) (Citations omitted). An extension of the rule indicates that exhaustion is not even required, where to pursue state review would be futile under state law. See *Pillette v. Foltz*, 824 F. 2d 494 (6th Cir 1987). See also *Cohen v. Tate*, 779 F. 2d 1181 (6th Cir. 1985).

And a showing of "cause" can be excused where one is "factually" innocent compared with "legally" innocent. *Cf. Ewing v. McMackin*, 799 F. 2d 1143, 1152 (6th Cir. 1986), with *Gilbert v. Parke*, 763 F. 2d 821 (6th Cir. 1985), and *Ferguson v. Knight*, 809 F. 2d 1239 (6th Cir. 1987), and *Harris v. Rees*, 794 F. 2d 1168 (6th Cir. 1986).

Taken together, the State's argument is simply that all of the Sixth Circuit's general rules on exhaustion, waiver of procedural default, due process and burden of proof are wrong. If so then their argument merely amounts to the contention that the Magistrate, District Court and Court of Appeals have all been mislead into applying erroneous general rules. Counsel thinks that this assertion, the real essence of the State's contention herein, must be pointed out under U.S. Sup. Ct. Rule 15.1. Basically, the State's argument proves too much. If adopted by this Court it would involve reviewing every habeas corpus decision forevermore. This is a radical perception indeed.

Counsel points out these results because of the belief that the Sixth Circuit panel in the present case has rendered no decision which is in conflict with decisions of other federal courts of appeals. The imposition of due process in state criminal trials is not a departure from the accepted and usual course of judicial proceedings under the United States Constitution. Nor does the present decision involve an important question of federal law which should be settled by this Court. And the decision in no way conflicts with applicable decisions of this Court. In fact, the State of Ohio doesn't appear to point to any of these aforementioned factors in asserting that certiorari should be granted.

Mr. Bell has asserted his innocence for twelve years. He simply desires a trial free of constitutional infirmity. The Sixth Circuit has simply followed, and applied, a general rule of due process: a due process violation occurs where the burden of proof of an essential element of the crime is shifted to Mr. Bell. As a general rule, habeas corpus must provide a remedy herein.

CONCLUSION

Respondent submits that for the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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